Center For Social Change, Inc. *and* Service Employees International Union, Local 500. Case 05–CA–072211

March 29, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES, GRIFFIN, FLYNN, AND BLOCK

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 9, 2012, the Acting General Counsel issued the complaint on January 18, 2012, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 05–RC–065270. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.[1]

On February 3, 2012, the Acting General Counsel filed a Motion for Summary Judgment. On February 7, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and the Acting General Counsel filed a reply to the Respondent's response.

Ruling on Motion for Summary Judgment

The Respondent contends that summary judgment is not appropriate because the Board lacks a quorum to act under *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). More specifically, the Respondent claims that the President's January 4, 2012 recess appointments of Members Richard F. Griffin, Terence F. Flynn, and Sharon Block occurred while the United States Senate was in session and were made without seeking the advice and consent of the Senate, in violation of Article II, Section 2, Clause 2 of the Constitution. Accordingly, the Respondent contends that, because the President's appointments were unconstitutional, the Board now lacks a quorum to act.

The Respondent also contends that the complaint is ultra vires and should be dismissed because the Acting General Counsel did not lawfully hold that office at the time he directed the complaint to be issued. In this regard, the Respondent contends that the President's appointment of the Acting General Counsel lapsed on July 31, 2010–40 days after his appointment–because no nomination had yet been submitted to the Senate to fill the position of General Counsel pursuant to 29 U.S.C. § 153(d). The Respondent further argues that the longer period allowed by the Federal Vacancies Reform Act of 1998 is not applicable.

Historically, the Board has declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act. Instead, it has applied the well-settled presumption of regularity of the official acts of public officers in the absence of clear evidence to the contrary. See, e.g., *Lutheran Home at Moorestown*, 334 NLRB 340, 340–341 (2001) (challenge to authority of Acting General Counsel) (citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14–15 (1926)). In keeping with this practice, we reject the Respondent's arguments that the Board lacks a quorum and that the Acting General Counsel lacked authority to issue the complaint.[2]

[1] The Respondent's answer denies knowledge or information sufficient to form a belief concerning the filing and service of the charge. Copies of the charge and affidavit of service of the charge are included in the documents supporting the Acting General Counsel's motion, showing the dates as alleged, and the Respondent has not challenged the authenticity of these documents.

In addition, we find no merit in the Respondent's affirmative defense that the complaint should be dismissed because the Respondent's service copy of the complaint was erroneously dated November 30, 2011, rather than the correct date of January 18, 2012. Nor do we find that there is a material issue of fact concerning the complaint's issuance date, as the original complaint, attached as an exhibit to the Acting General Counsel's motion for summary judgment, bears the correct date. The Acting General Counsel stated in his response to the Respondent's response to the Notice to Show Cause that the incorrect date on the Respondent's service copy was a typographical error resulting from administrative oversight. All other aspects of the Respondent's service copy of the complaint were accurate, the affidavit of service is dated January 18, 2012, and the Respondent filed an answer within the specified deadline. The Respondent has not shown, nor raised any claim, that it was prejudiced by the incorrect date.

[2] Member Flynn agrees that in *Lutheran Home at Moorestown*, supra, the Board found that it was not appropriate for it to decide, in the context of a test of certification summary judgment case, the validity of the then-Acting General Counsel's appointment pursuant to 5 U.S.C. § 3345(a), as amended by the Federal Vacancies Reform Act of 1998. Applying that precedent solely to that extent, without reliance on any presumption of regularity of the official acts of public officers, he joins his colleagues in declining to determine the merits of the Respondent's challenge to the current Acting General Counsel's appointment. As to the validity of the challenged Board Member recess appointments, Member Flynn finds no jurisdictional basis for the Board to decide that issue, and the Respondent cites none. Again, in so concluding, Member Flynn does not rely on any presumption of regularity.

Member Hayes finds no jurisdictional basis for the Board to decide either the challenge to the Acting General Counsel's appointment or the Board Member recess appointments. He does not rely on a presumption of regularity of the official acts of public officers in either instance, and he disagrees with the Board's reliance on such a presumption in *Lutheran Home at Moorestown*, supra.

The Respondent admits its refusal to bargain,[3] but contests the validity of the Union's certification. The Respondent's challenge is based on its contention, also raised in the underlying representation proceeding, that the Regional Director abused his discretion in ordering a mail-ballot election rather than conducting a manual-ballot election. In a related argument, the Respondent contends that a hearing is needed to develop a record to explain why 52 percent of the unit employees purportedly "were disenfranchised," including, among other things, a review of the mail ballots that were returned for improper addresses, examination of witnesses as to why they failed to vote, and a determination of whether adequate notice of the election and mail-ballot procedures were received by voters. The Respondent, however, failed to file timely objections to the conduct of the election, as required by Section 102.69 of the Board's Rules, and is therefore precluded from raising the issue of disenfranchised voters in this proceeding.[4] *Superior Protection Inc*., 341 NLRB 267 (2004), reconsideration denied 341 NLRB 614 (2004), enfd. 401 F.3d 282 (5th Cir. 2005), cert. denied 546 U.S. 874 (2005).

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[5] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.[6]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Maryland not-for-profit corporation with its principal headquarters in Elkridge, Maryland, and places of business located in Baltimore and Howard Counties, Maryland, has been engaged in providing in-patient residential services for adult individuals and children, adult day care services, and supported employment programs for individuals with developmental disabilities and disorders.

During the 12-month period preceding the issuance of the complaint, a representative period, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $250,000, and purchased and received at its Maryland facilities products, goods, and materials valued in excess of $5000 directly from points located outside the State of Maryland.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, Service Employees International Union, Local 500, is a labor organization within the meaning of Section 2(5) of the Act.[7]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held by mail ballot from November 4 through 21, 2011, the Union was certified on December 1, 2011, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time, regular part-time and on-call/relief employees who provide direct care, direct care awake-overnight, and direct care-week-end, job coach, and maintenance associates employed by the Employer at its facilities in Maryland, but excluding office clerical employees, coordinators, managerial employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act, as amended.

[3] The Respondent's answer denies the allegations in complaint pars. 8 and 9. These paragraphs state, respectively, the legal conclusions that the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Sec. 8(a)(5) and (1) of the Act, and that the unfair labor practices of the Respondent affect commerce within the meaning of Sec. 2(6) and (7) of the Act. The Respondent's answer admits its refusal to bargain and that it is an employer engaged in commerce. Accordingly, the Respondent's denials with respect to these allegations do not raise any material issues of fact to be litigated in this proceeding.

[4] The Respondent's request for a hearing is therefore denied.

[5] Members Griffin, Flynn, and Block did not participate in the underlying representation proceeding. They agree, however, that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decision in the representation proceeding, and that summary judgment is therefore appropriate.

[6] The Respondent's request for oral argument is denied as the record, the Respondent's response to the Notice to Show Cause, and the Acting General Counsel's reply adequately present the issues and the positions of the parties. In addition, the Respondent's request to dismiss the complaint also is denied.

[7] The Respondent's answer denies the Union's status as a labor organization. The Respondent, however, effectively stipulated in the underlying representation proceeding that the Union is a labor organization within the meaning of the Act. Accordingly, we find that the Respondent's answer does not raise any issue warranting a hearing with respect to this allegation. See *All American Services & Supplies*, 340 NLRB 239 fn. 2 (2003).

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letter dated December 16, 2011, the Union requested that the Respondent bargain collectively with the Union about the terms and conditions of employment of the unit. By letter dated January 5, 2012, the Respondent refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.[8] We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since January 5, 2012, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Center for Social Change, Inc., Elkridge, Baltimore County, and Howard County, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Service Employees International Union, Local 500 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time, regular part-time and on-call/relief employees who provide direct care, direct care awake-overnight, and direct care-week-end, job coach, and maintenance associates employed by the Employer at its facilities in Maryland, but excluding office clerical employees, coordinators, managerial employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act, as amended.

(b) Within 14 days after service by the Region, post at its facilities in Elkridge, Baltimore County, and Howard County, Maryland, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[10] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other

[8] This letter was signed by Joseph Matthew, as president and CEO of the Respondent. The complaint alleges that Matthew has been a supervisor of the Respondent within the meaning of Sec. 2(11) of the Act and an agent of the Respondent within the meaning of Sec. 2(13) of the Act. Although the Respondent's answer denies these allegations, we find that the Respondent's denials do not preclude summary judgment or raise material issues of fact warranting a hearing because the Respondent admits in its answer that it has refused to bargain with the Union.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[10] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice. Member Flynn did not participate in *J. Picini Flooring* but recognizes it as extant precedent, which he applies for institutional reasons.

material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Service Employees International Union, Local 500 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time, regular part-time and on-call/relief employees who provide direct care, direct care awake-overnight, and direct care-week-end, job coach, and maintenance associates employed by us at our facilities in Maryland, but excluding office clerical employees, coordinators, managerial employees, professional employees, guards, and supervisors as defined in the National Labor Relations Act, as amended.

CENTER FOR SOCIAL CHANGE, INC.